FILED

OCT 24 2001

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RANDY ARROYO,	§	
	§	
Petitioner,	§	
	§	
V.	§	**CIVIL NO. SA-01-CA-976-EP**
	§	
JANIE COCKRELL, Director,	§	
Texas Department of Criminal	§	
Justice, Institutional Division,	§	
	§	
Respondent.	§	

ORDER APPOINTING COUNSEL, SETTING DEADLINES, DENYING IN FORMA PAUPERIS STATUS, AND DENYING MOTION FOR APPOINTMENT OF CO-COUNSEL

On October 22, 2001,[1] petitioner Randy Arroyo filed a single motion in which he requested (1) leave to proceed In Forma Pauperis, (2) appointment of the counsel, pursuant to the procedures outlined in the Supreme Court's opinion in **McFarland v. Scott**,[2] of the same attorney who represented petitioner in the state habeas corpus proceeding collaterally attacking petitioner's state capital murder conviction and sentence of death, and (3) appointment of co-counsel to assist said counsel in filing a federal habeas corpus petition on petitioner's behalf.

Petitioner represents that he was convicted of murder in Bexar County on March 6, 1998 and that the Texas Court of criminal Appeals affirmed his conviction and sentence in an unpublished

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[1] See docket entry no. 1.

[2] 512 U.S. 849, 854-59, 114 S.Ct. 2568, 2572-74, 129 L.Ed.2d 666 (1994).

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opinion issued May 9, 2001. The United States Supreme Court denied petitioner's certiorari petition on October 9, 2001.[3]

Petitioner represents that the Texas Court of criminal Appeals denied his application for state habeas corpus relief on October 10, 2001.

In Forma Pauperis Application

The filing fee in this action, filed pursuant to Title 28 U.S.C. Section 2254, is five dollars ($5.00). Petitioner's request for leave to proceed In Forma pauperis in this cause is defective in that petitioner has failed to present any evidence establishing that petitioner is currently unable to pay the minimal filing fee. Petitioner's application is accompanied by an out-of-date declaration regarding petitioner's inability to pay the filing fee that does not contain a certificate of inmate account or any other independently verifiable statement regarding the current balance in petitioner's inmate trust account. Petitioner is not entitled to proceed In Forma Pauperis in this cause based upon the submission of an unverified document dated May 24, 2001 that fails to furnish any information regarding the current balance in petitioner's inmate trust account.

Petitioner may obtain a verified certificate stating the current balance in his inmate trust account, as well as a record of all deposits into said account for the last six months, from the law librarian at his unit of the Texas Department of criminal Justice. Alternatively, petitioner may simply pay the five dollar filing fee. However, at this juncture, petitioner has failed to establish that he lacks the financial resources with which to pay the modest filing fee in this cause.

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[3] See **Arroyo v. Texas**, ___ U.S. ___, ___ S.Ct. ___, __ L.Ed.2d ___ [2001 WL 744232] (2001).

Motion for Appointment of Counsel

As noted by the Supreme Court in its opinion in **McFarland**, a state prisoner facing a death sentence has a qualified statutory right to the appointment of counsel in connection with a federal habeas corpus proceeding challenging his criminal conviction and death sentence.[4] Petitioner requests this Court to appoint counsel to represent him herein pursuant to Title 21 U.S.C. Section 848(q)(4)(B) and the Supreme Court's holding in **McFarland**. The Court will grant that request and will appoint the attorney who represented petitioner in his state habeas corpus proceeding and who prepared the petitioner's motion for appointment of counsel, who qualifies for appointment under applicable law, as counsel to represent petitioner herein. The Court believes that appointing an attorney who is already well-versed in the facts relevant to petitioner's case will help expedite the disposition of this cause in this Court. The Court finds that attorney Rogelio F. Munoz, who is admitted to practice before this Court qualifies for appointment in accordance with Title 21 U.S.C. Section 848(q). Said counsel is familiar with the facts in petitioner's case and should be able to prepare and file a federal habeas corpus petition in a reasonable period of time. This Court believes that it is reasonable to direct petitioner's counsel file a federal habeas corpus petition on petitioner's behalf within approximately three months from the date of this Order.

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[4] See **Sterling v. Scott**, 57 F.3d 451, 454 (5th Cir. 1995), **cert. denied**, 516 U.S. 1050 (1996).

This Court will entertain a motion requesting an extension on the deadline for the filing of petitioner's federal habeas corpus petition if said motion is filed prior to the deadline for the filing of that petition and said motion is accompanied by a clear and unambiguous statement of good cause for any such requested extension.

The Court will direct the Clerk to send to petitioner's newly-appointed counsel all documents necessary to permit said counsel to file the appropriate vouchers and to obtain reimbursement for expenses.

The Court will also direct the Clerk to send a copy of this Order to the Capital Litigation Division of the Office of the Texas Attorney General.

No Absolute Right to Co-Counsel

However, petitioner has not alleged any facts establishing that the appointment of a co-counsel to assist said counsel in the preparation of a federal habeas corpus petition on petitioner's behalf is necessary in this cause. The exhaustion doctrine necessarily limits petitioner to presenting this Court with only those claims for federal habeas corpus relief that petitioner has previously "fairly presented" to the state courts in the course of either the petitioner's direct appeal or state habeas corpus proceeding.

Under the AEDPA, federal courts lack the power to grant habeas corpus relief on unexhausted claims.[5] A fundamental prerequisite to federal habeas corpus relief under Title 28 U.S.C. Section 2254 is the exhaustion of all claims in state court under Section 2254 prior to requesting federal collateral relief.[6] A federal court is free to raise the lack of exhaustion sua sponte.[7]

A state prisoner must exhaust all available state court remedies before he can obtain federal habeas corpus relief, unless circumstances exist which render the state corrective process ineffective to protect the prisoner's rights.[8] In order to exhaust, a petitioner must "fairly present" all of his claims to the state courts.[9] The exhaustion requirement is satisfied when the substance of the federal habeas claim has been "fairly presented" to the highest state court, i.e., the petitioner presents his claims before the state courts in a procedurally proper manner according to the rules of the state courts.[10] The presentation of claims for the first time on discretionary review to the state's highest court does not constitute "fair presentation" for exhaustion purposes.[11] Full exhaustion of all claims presented is required before federal habeas corpus relief is available.[12] The exhaustion requirement is not met if the petitioner presents new legal theories or factual claims in his federal habeas petition.[13]

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[5] See **Mercadel v. Johnson**, 179 F.3d 271, 276-77 (5th Cir. 1999); **Alexander v. Johnson**, 163 F.3d 906, 908 (5th Cir. 1998); and **Jones v. Jones**, 163 F.3d 285, 299 (5th Cir. 1998), **cert. denied**, 528 U.S. 895 (1999).

[6] **Sterling v. Scott**, 57 F.3d 451, 453 (5th Cir. 1995), **cert. denied**, 516 U.S. 1050 (1996).

[7] See **Granberry v. Greer**, 481 U.S. 129, 133-36, 107 S.Ct. 1671, 1674-76, 95 L.Ed.2d 119 (1987); **Shute v. State of Texas**, 117 F.3d 233, 237 (5th Cir. 1997); and **Graham v. Johnson**, 94 F.3d 958, 970 (5th Cir. 1996). A federal court is also free to disregard a State's waiver of the exhaustion requirement when the interests of comity require such. See **Earhart v. Johnson**, 132 F.3d 1062, 1065 (5th Cir. 1998), **cert. denied**, 525 U.S. 933 (1998).

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[8] See **Picard v. Connor**, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971); **Alexander v. Johnson**, 163 F.3d at 908-09; **Jones v. Jones**, 163 F.3d at 296; **Deters v. Collins**, 985 F.2d 789, 795 (5th Cir. 1993); **Yohey v. Collins**, 985 F.2d 222, 226 (5th Cir. 1993); **Thomas v. Collins**, 919 F.2d 333, 334 (5th Cir. 1990), **cert. denied**, 501 U.S. 1235 (1991); **Satterwhite v. Lynaugh**, 886 F.2d 90, 92 (5th Cir. 1989); and **Richardson v. Procunier**, 762 F.2d 429, 430 (5th Cir. 1985).

[9] See **Picard v. Connor**, 404 U.S. at 275-76, 92 S.Ct. at 512-13; **Duncan v. Henry**, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); **Jones v. Jones**, 163 F.3d at 296; and **Shute v. State of Texas**, 117 F.3d at 237: "a habeas petitioner 'must fairly apprize the highest court of his state of the federal rights which were allegedly violated.'" In Texas, the highest state court with jurisdiction to review the validity of a state criminal conviction is the Texas Court of Criminal Appeals. See **Richardson v. Procunier**, 762 F.2d at 431-32.

[10] **Mercadel v. Johnson**, 179 F.3d at 275.

[11] **Castille v. Peoples**, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989); **Satterwhite v. Lynaugh**, 886 F.2d at 92.

While this Court has, upon occasion, appointed multiple counsel to represent a federal habeas corpus petitioner challenging a state capital murder conviction and death sentence, those cases have involved situations in which either a counsel different from the petitioner's state habeas counsel represented petitioner before this Court or the case involved complex issues. Petitioner has not alleged any facts showing that his federal habeas corpus claims will be any different frm the claims the petitioner has already presented to the state courts through direct appeal or in petitioner's state habeas corpus proceeding. Nor has petitioner alleged any facts showing that any of his proposed claims in this Court involve complex legal or factual issues. Therefore, petitioner has not established the necessity for the appointment of a second attorney to represent petitioner in this cause. Petitioner may file a second motion requesting appointment of a co-counsel but should accompany same with an explanation as to why petitioner's former state habeas counsel, acting alone, will be unable to adequately represent petitioner in this cause.

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[12] See **Rose v. Lundy**, 455 U.S. 509, 518-22, 103 S.Ct. 1198, 1203-05, 71 L.Ed.2d 379 (1982); and **Thomas v. Collins**, 919 F.2d at 334.

[13] See **Anderson v. Harless**, 459 U.S. 4, 6-7, 103 S.Ct. 276, 277-78, 74 L.Ed.2d 3 (1982); and **Finley v. Johnson**, 243 F.3d 215, 219 (5th Cir. 2001).

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion for appointment of counsel, filed October 22, 2001,[14] is **GRANTED** as follows: attorney Rogelio F. Munoz, whose mailing address is 225 South Getty Street, Uvalde, Texas, 78801, and whose telephone number is (830) 278-1150, is appointed counsel of record for petitioner herein. The Clerk shall send to said counsel a copy of this Order and all forms and vouchers necessary to permit said counsel to comply with all requirements for obtaining reimbursement for expenses and payment for attorneys fees for services rendered in connection with this cause.

2. On or before **February 1, 2002**, petitioner shall file, and serve on the Capital Litigation Division of the Office of the Texas Attorney General, his federal habeas corpus petition in this cause and include therein all grounds for federal habeas corpus relief that he wishes this Court to consider in connection with his capital murder conviction and death sentence.

3. Respondent shall file his answer to petitioner's federal habeas corpus petition or other responsive pleading on or before sixty (60) days after receipt of a copy of petitioner's federal habeas petition. Respondent's answer or other responsive pleading

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[14] See docket entry no. 1.

shall conform to the requirements of Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 12 of the Federal Rules of Civil Procedure.

4. Respondent shall serve petitioner's counsel of record with a copy of said answer or other responsive pleading in accordance with the provisions of Rule 5(b), Federal Rules of Civil Procedure.

5. Exhaustion and Procedural Bar Issues Respondent shall clearly and directly respond to the issue of whether petitioner has exhausted available state remedies with regard to each of the grounds for federal habeas corpus relief set forth in petitioner's pleadings filed in this cause as of this date. If respondent denies that petitioner has exhausted available state remedies with regard to each ground for federal habeas relief set forth in petitioner's pleadings herein, respondent shall explain, in detail, those state remedies still available to petitioner with regard to each unexhausted claim. In the event that respondent wishes to assert the defense that the petitioner has procedurally defaulted on any claim for relief contained in petitioner's federal habeas corpus petition, respondent shall explicitly assert that defense and identify with specificity which of the petitioner's claims the respondent contends are procedurally barred from consideration by this Court.

6. Abuse of the Writ In the event that respondent wishes to assert the defense that the petitioner has abused the writ, respondent shall explicitly assert that defense and identify with specificity which of the petitioner's claims herein either were included in a prior federal habeas corpus petition by petitioner or could, with the exercise of diligence on petitioner's part, have been included in an earlier federal habeas petition by petitioner.

7. Second or Successive Petition In the event that the respondent wishes to assert the defense that this is a second or successive petition filed by the petitioner attacking the same state criminal proceeding and that the petitioner has failed to comply with the requirements of Title 28 U.S.C. Section 2244, the respondent shall explicitly assert that defense.

8. Limitations In the event that respondent wishes to assert the defense that the petitioner has failed to file this federal habeas corpus action within the one-year statute of limitations set forth in Title 28 U.S.C. Section 2244(d), respondent shall explicitly assert that defense and identify with specificity the date on which the one-year limitations period began to run and all time periods during which that limitations period was tolled.

9. State Court Records On or before thirty (30) days after the date respondent files his answer or other responsive pleading in this cause, respondent shall submit to the Clerk of this Court

true and correct copies of all pertinent state court records from petitioner's state court proceedings.

10. Petitioner's Reply On or before twenty (20) days after the date respondent serves petitioner's counsel of record with a copy of respondent's answer or other responsive pleading, petitioner shall file with the Clerk of this Court and serve on respondent's counsel of record any reply he wishes to make to respondent's answer or other responsive pleading.

11. Any party seeking an extension on any of the foregoing deadlines shall file a written motion requesting such extension prior to the expiration of the deadline in question and shall set forth in such motion a detailed description of the reasons why that party, despite the exercise of due diligence, will be unable to comply with that deadline.

12. Petitioner's request for leave to proceed In Forma Pauperis is **DENIED**.

13. On or before thirty (30) days from the date of this Order, the petitioner shall either (1) pay the five dollar ($5.00) filing fee in this cause or (2) file a properly completed application for leave to proceed In Forma Pauperis, together with a certified copy of the petitioner's inmate trust account statement for the past six months.

14. The Clerk shall send to petitioner's counsel of record one blank In Forma Pauperis application.

15. Petitioner's motion requesting appointment of a co-counsel is **DENIED** WITHOUT PREJUDICE.

16. The Clerk shall send a copy of this Order to both the Capital Litigation Division of the Office of the Attorney General of Texas and the petitioner's newly-appointed counsel of record.

SIGNED AND ENTERED this 24th **day of October, 2001, at San Antonio, Texas.**

Edward C. Prado

EDWARD C. PRADO
United States District Judge